

Zhou (Migration) [2021] AATA 978 (11 February 2021)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Bo Zhou
CASE NUMBER:	1801819
HOME AFFAIRS REFERENCE(S):	BCC2017/2170983
MEMBER:	David Crawshay
DATE OF ORAL DECISION:	11 February 2021
DATE OF WRITTEN STATEMENT:	2 March 2021
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa: • cl 820.211 of Schedule 2 to the Regulations; and • cl 820.221 of Schedule 2 to the Regulations

Statement made on 02 March 2021 at 10:32am

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – genuine and continuing relationship – adverse information – anonymous allegation of payment for arranged marriage unverifiable and given very little weight – validly married – financial, household and social aspects of relationship – nature of commitment – applicant currently in home country and unable to return because of COVID-19 travel restrictions – overwhelming weight of evidence supports genuine relationship – decision under review remitted

LEGISLATION

*Migration Act 1958 (Cth), ss 5F(2), 65, 359A, 376
Migration Regulations 1994 (Cth), r 1.15A(3), Schedule 2, cls 820.211(2)(a), 820.221*

CASE

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s 65 of the *Migration Act 1958* (Cth) (the Act).
2. The applicant applied for the visa on 19 June 2017 on the basis of his relationship with his sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations).
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl 820.211(2)(a) because there was insufficient evidence to demonstrate that the applicant was the spouse or de facto partner of the sponsor.
4. The applicant appeared before the Tribunal on 14 December 2020 to give evidence and present arguments (initial hearing). As the applicant was offshore at the time, he appeared via telephone. The Tribunal also received oral evidence from the sponsor in person. It became necessary to convene another hearing on 11 February 2021 (resumed hearing) in order to hear the evidence from the applicant's two witnesses, Ms Dan Liu (Ms Liu) and Ms Liu Wen (Ms Wen), as well as to allow the applicant to attend an interview over information contained within a s.359A letter sent by the Tribunal. As in the initial hearing, the applicant appeared via telephone in the resumed hearing as he was still offshore.
5. The applicant was represented in relation to the review by his registered migration agent who was present at the hearings.
6. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

BACKGROUND

7. The parties claim to have met as students at high school in Xi'an, China in the early 1990s. They claim to have been close before they graduated in 1992, taking part in school productions. They claim to have been friends with Ms Liu who was a classmate.
8. The parties then claim to have lost contact with each other, with the sponsor eventually moving to Australia while the applicant stayed in China. The applicant claims to have worked in several government jobs, recently working for the Xi'an Municipal Foreign and Overseas Chinese Affairs Office. The sponsor claims to have worked in a clothing factory before recently becoming a health services assistant.
9. The parties claim that they resumed contact through Ms Liu, who met the sponsor by accident at a shopping centre in Box Hill in August 2016 and told her about the applicant. The parties claim that later on that month they began contacting each other through WeChat and would chat almost every day.
10. The parties claim that the sponsor and her daughter travelled to Xi'an in late-December 2016 and stayed for around a month, during which time the parties visited and were introduced to members of both families. After this time, the parties claim to have begun their relationship. The sponsor and her daughter returned to Australia in early-February 2017.

11. In April 2017, the applicant arrived in Melbourne and the parties claim that he began living with the sponsor at an address in Heidelberg Heights. On 23 May 2017, the parties were married in Box Hill and claimed to have held a banquet afterwards.
12. On 19 June 2017, the parties lodged the visa application. On 11 January 2018, the visa was rejected and on 24 January 2018, the review application was lodged.
13. The parties have purportedly travelled to Sydney and Hobart on holidays, as well as twice to China in 2019.
14. In January 2020, the applicant travelled to China, this time by himself, to visit his family after the sudden death of his father. He claims to have been forced to stay in China due to the travel ban on passengers from there. In February 2020, the applicant's bridging B visa was cancelled, and after the parties challenged the decision the cancellation was revoked. The applicant has remained in China, the reasons given being the cost of flights and quarantine. The applicant also claims to be waiting for further developments such as the vaccine.

DISCLOSURE CERTIFICATE AND INVITATION TO COMMENT ON OR RESPOND TO INFORMATION

15. Before the resumed hearing, on 21 January 2021, the Tribunal sent an email to the applicant via his representative attaching a s.359A letter which relevantly provided as follows:

The particulars of the information are:

- You paid a substantial sum of money to the sponsor, Ms Chun Wang HE, in an arranged marriage so you could remain in Australia; and
- Your sponsor has been involved in at least two other arranged marriages in the past where she has been paid substantial sums of money in each.

This information was given to an Australian Government agency by a community contact.

This information is relevant to the review because it suggests that your marriage to the sponsor is arranged and is not a genuine and continuing one.

If the Tribunal relies on this information in making its decision, it may cause it to not be satisfied that your relationship with the sponsor was genuine and continuing at the time of application and continues to be genuine and continuing.

This would be the reason, or a part of the reason, for affirming the decision under review.

16. On 8 February 2021, the Tribunal sent to the applicant through his representative a copy of the non-disclosure certificate under s.376 which covered the information the subject of the s.359A letter of 21 January 2021.
17. On the same day, the representative requested further particulars of the information contained within the s.359A letter. On 9 February 2021, the Tribunal relevantly responded as follows:

[T]he Tribunal is willing to divulge the following other information contained within the allegation:

- The sum of money alleged to have been paid to the sponsor by the applicant has been quantified to the nearest \$10,000. It is a sum of between \$50,000 and

\$100,000 (all references are to AUD), which was electronically transmitted to Australia and then paid to the sponsor;

- The visa travelled on by Mr Bo Zhou was a 12-month tourist visa (type unknown);
- The allegation was received in June 2017;
- Mr Bo Zhou is the sponsor's fourth husband who is a Chinese national; and
- The sponsor's previous two husbands paid her a sum of between \$50,000 and \$80,000. Again, as above, the sums of money alleged to have been paid to the sponsor have been quantified to the nearest \$10,000.

18. On 10 February 2021, the Tribunal received an email from the representative attaching submissions of the same date, as well as a statutory declaration from the sponsor of the same date and exhibits. Later that day, it received an additional email attaching a statement from the applicant dated 8 February 2021, an additional statement from the applicant dated 10 February 2021, and exhibits. The parties indicated their strong denial of the information contained within the s.359A letter and the further particulars.

19. At the resumed hearing, the sponsor repeated her denial of the information. In response to questioning of the sponsor by the Tribunal about her financial affairs and specifically about her ability to be able to afford the mortgage repayments on multiple properties (two at present), she provided answers that were relevant and plausible, including that she had used money from her weekly income and her Centrelink family tax benefit payments as well as rental income from a property and the proceeds from the sale of another property. The Tribunal also notes that, while there is evidence of the applicant transferring sums of money to the parties' joint account, these sums do not appear to add up to the amount alleged, and it is arguable that these sums were used for joint purposes and therefore cannot be properly characterised as payments from one party to another.

20. The Tribunal has had regard to this information when considering the overall question of whether the applicant is the spouse of the sponsor. It accepts that this information, if correct, would be highly adverse to the applicant's visa application as it alleges that a substantial sum of money was paid in order for the sponsor to marry the applicant and to sponsor the applicant for a visa.

21. However, the Tribunal has also considered some of the circumstances in which the information was given. The information appeared on a document from an Australian Government agency. It states that the information was given to that agency by a member of a second Australian Government agency, who in turn was given it by a person designated as a "community contact". It is therefore third or fourth-hand information. Furthermore, while the name of the purported member of the agency (through whom the information was given by the community contact) has been given, a later email from other members of that agency indicates that there is no record of that person from within the agency. The Tribunal cannot be assured of the identity of the person through whom the information was given.

22. Therefore, while the information contains very serious allegations of migration fraud, the Tribunal is not satisfied that the information is in fact true. For the reasons given, the Tribunal is forced to give this information very little weight in its consideration of the overall question.

CONSIDERATION OF CLAIMS AND EVIDENCE

23. The issue in the present case is whether the applicant is the spouse of the sponsor under s.5F(2) at the time of application and at the time of this decision.

Whether the parties are in a spouse or de facto relationship

24. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen.
25. “Spouse” is defined in s 5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s 5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties’ household and their commitment to each other as set out in reg 1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in reg 1.15A(3) is effectively a question which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

26. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The Tribunal has sighted a copy of a certificate for a marriage that took place on 23 May 2017 and is satisfied that it is genuine and that the parties were free to marry each other. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s 5F(2)(a).

Are the other requirements for a spouse relationship met?

27. The Tribunal has been in receipt of copious amounts of evidence from the parties and their representative, relevantly including:
- relationship statements from the parties;
 - correspondence addressed to one or both parties at the Heidelberg Heights address;
 - statutory declarations from third parties attesting to the genuineness of the parties’ relationship, including the sponsor’s daughter and the two witnesses;
 - evidence of the parties’ holidays, including travel itineraries and bookings;
 - evidence of the parties’ financial affairs;
 - photographs of the parties by themselves and in social situations;
 - evidence of the parties attending the same secondary school in China; and
 - legal submissions.
28. The Tribunal considers that this additional evidence goes directly to addressing the four matters for consideration under subreg.1.15A(3) – namely, the financial aspects of the relationship, the nature of the household, the social aspects of the relationship and the nature of the parties’ commitment to each other. It will be provided to the Department upon remittal.

The financial aspects of the relationship

29. Regarding the financial aspects of the parties' relationship, the Tribunal finds that the parties do not have any joint real estate or other assets, nor do they bear any joint liabilities. The applicant told the Tribunal that he has contributed money to the parties' joint account out of which come the mortgage payments over the Heidelberg Heights address.
30. The Tribunal finds that the parties have integrated their finances to a reasonable degree. The parties' salaries are deposited into a joint account out of which they pay for some expenses.
31. In relation to the question of whether one party owes the other any legal obligations, the Tribunal notes that the parties have drawn wills in each other's favour, the applicant is a beneficiary of the sponsor's superannuation account, and the applicant shares the use of the sponsor's salary packaging entertainment card.
32. Finally, and based on evidence such as the parties' bank account statements, the Tribunal accepts that the parties share in the payment of day-to-day household expenses.
33. The Tribunal accepts that the evidence of the financial aspects of the parties' relationship points to them being in a genuine and continuing relationship.

The nature of the household

34. In terms of the nature of the parties' household, the Tribunal has considered evidence such as correspondence addressed to one or both parties. It has considered the consistent testimony given by them at the hearings, along with evidence given by their witnesses before and at hearing. It has also considered a statement given by the sponsor's daughter.
35. Based on this evidence, it accepts that the parties have lived together and share a common household. It accepts that they operate as if they are in a married relationship, entertaining friends at their house. It accepts that they share in the responsibility for housework.

The social aspects of the relationship

36. The Tribunal has had regard to a substantial amount of evidence pointing to the social aspects of the parties' relationship, including photographs of the parties with family and friends in Australia and China, declarations and letters from friends and acquaintances, itineraries and other evidence of their travels on holidays to Sydney and Hobart including itineraries and photographs, and documents submitted to government agencies such as to the ATO.
37. The Tribunal has had special regard to the testimony of the parties' two witnesses at the resumed hearing – Ms Liu Wen and Ms Dan Liu – who claim to know the parties from school. Both witnesses told it that they socialise regularly with the parties. Both said that they attended the parties' wedding.
38. The Tribunal accepts based on this evidence that the parties represent themselves to other people as being in a married relationship and that they are regarded by their acquaintances as being in a genuine relationship. It accepts that they plan and undertake joint social activities.

The nature of the parties' commitment to each other

39. Turning lastly to the nature of the parties' relationship, the Tribunal accepts based on the evidence including their high school certificates and the testimony of Ms Wen and Ms Liu that the parties knew each other since the latter years of their schooling in the early 1990s and accepts that they have a history that goes back to this time, albeit that they then went to live their own lives with their respective partners. It accepts that they reunited through the efforts of Ms Liu, first via social media in August 2016 and then in person in December 2016 when the sponsor and her daughter flew to China to visit the applicant.
40. The Tribunal accepts that the parties began living together in April 2017 when the applicant travelled over from China to visit Australia. It accepts that they have been separated physically since January 2020 due to the ongoing COVID-19 pandemic.
41. The Tribunal accepts that the parties have been in a relationship for around four years and have lived together for the majority of that time. It accepts that they have not been living separately and apart during the times they have been physically apart from each other.
42. The Tribunal accepts from the totality of evidence that the parties draw a substantial degree of companionship and emotional support from each other. In this regard, the Tribunal particularly notes the voluminous amount of correspondence between the parties during the period they have been physically apart in 2020 which was shown to it at the initial hearing. It also notes evidence showing that the sponsor has stepped in to advocate for the applicant during a dispute in VCAT and when his bridging B visa was cancelled earlier in 2020. Finally, it notes that the parties displayed a detailed knowledge of each other's lives and families, and they share a number of hobbies and interests, including their religiosity and their commitment to charity.
43. The Tribunal is satisfied that the evidence in relation to the nature of the parties' commitment to each other indicates that they are in a genuine and continuing relationship and that they have a commitment to a shared life as a married couple to the exclusion of all others at the time of application and at the time of this decision, and that they lived together at the time of application and do not live separately and apart at the time of this decision.

CONCLUSION

44. In coming to the conclusion that it does, the Tribunal is aware of the seriousness of the allegations that were relayed to it through a purported member of an Australian Government agency. These allegations, if true, would seriously challenge the notion of the parties' relationship being genuine and continuing, at least at the time of application. In the eyes of the Tribunal, these allegations, if true, would be so adverse as to cast a pall over the otherwise substantial and plausible evidence given by the parties in support of their relationship.
45. However, and as was communicated to the parties at the resumed hearing, the Tribunal must go with the evidence. Notwithstanding the seriousness of the allegations, it is forced to give them limited weight for the reasons given above where it would normally accord them significant and decisive weight. Without the benefit of being able to give them such weight, the Tribunal instead finds that the overwhelming weight of evidence points towards the parties being in a relationship that satisfies the requirements of s.5F(2). This includes evidence confirming that the parties knew each other at school, as well as the testimony of Ms Wen and Ms Liu who it finds are credible and reliable witnesses.
46. On the basis of the above the Tribunal is satisfied that the requirements of s 5F(2) are met at the time the visa application was made.

47. Therefore, the applicant meets cl 820.211(2)(a).
48. The Tribunal is satisfied that the applicant was sponsored by the sponsor at the time of application as per cl.820.211(2)(c)(i) and that the applicant held a substantive visa at the time he applied for the present visa and therefore does not need to satisfy the requirements under cl.820.211(2)(d).
49. Therefore, the applicant meets cl.820.211.
50. Because the applicant has continued to meet the requirements of cl.820.211(2) at the time of decision, he meets cl.820.221.
51. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

52. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:
 - cl 820.211 of Schedule 2 to the Regulations; and
 - cl 820.221 of Schedule 2 to the Regulations.

David Crawshay
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

(1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.

- (2) If the Minister is considering an application for:
- (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).